

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TYLER MILLS,) CASE NO. C04-2342-RSL-MAT
Plaintiff,)
v.) REPORT AND RECOMMENDATION
RON SIMS, et al.,)
Defendants.)

INTRODUCTION AND SUMMARY CONCLUSION

This is a *pro se* civil rights action under 42 U.S.C. § 1983. This matter is now before the Court on plaintiff's motions for preliminary injunctive relief and for class certification. Defendants have filed a brief in opposition to plaintiff's motion for injunctive relief. Defendants have not responded in any fashion to plaintiff's motion for class certification. This Court, having reviewed plaintiff's pending motions, and the balance of the record, concludes that plaintiff's motions for preliminary injunctive relief and for class certification should be denied.

DISCUSSION

Motion for Preliminary Injunctive Relief

The basic function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits. *Los Angeles Memorial Coliseum Com'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). A party seeking a preliminary

injunction must fulfill one of two standards, the "traditional" or the "alternative." *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987).

Under the traditional standard, a court may issue preliminary relief if it finds that (1) the moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and (4) the public interest favors granting relief. . . . Under the alternative standard, the moving party may meet its burden by demonstrating either (1) a combination of probable success and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.

Cassim v. Bowen, 824 F.2d at 795 (citations omitted).

The standards "are not discrete tests, but are instead 'outer reaches of a single continuum.'" *Pratt v. Rowland*, 65 F.3d 802, 805 (9th Cir. 1995) (citing *Chalk v. United States Dist. Ct.*, 840 F.2d 701, 704 (9th Cir. 1988)). To obtain injunctive relief under either standard the moving party must demonstrate exposure to irreparable harm absent the requested judicial intervention. *Caribbean Marine Services Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). Speculative injury does not constitute irreparable injury sufficient to warrant granting preliminary relief. *Id.* Rather, "a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Id.* (emphasis in original).

Plaintiff alleges in his amended and supplemental complaint, filed January 14, 2005, that his confinement in the acute psychiatric unit at the King County Correctional Facility ("KCCF") violates his federal and state constitutional rights, the Mental Health Bill of Rights, Title II of the Americans with Disabilities Act, the Developmental Disabilities Assistance and Bill of Rights Act, and the Rehabilitation Act. (Dkt. No. 12.) Plaintiff challenges both the fact of his confinement in the psychiatric housing unit, and the conditions of his confinement in that unit. (*See id.*)

In his motion for preliminary injunctive relief, plaintiff asserts that his developmental and mental disabilities cannot be adequately treated at KCCF, and that his mental health has deteriorated to the point where he is considering killing himself. (Dkt. No. 16.) He further asserts that defendants have retaliated against him for filing the instant action, and that defendants consistently refuse to allow him adequate access to the telephone to consult his attorneys. (Dkt.

01 No. 16.) Plaintiff seeks an order directing that he be transferred to a facility that can adequately
02 treat his developmental and mental disabilities, and that he be afforded adequate access to the
03 telephone to consult with his attorneys. (*Id.*)

04 Defendants have submitted a brief in opposition to plaintiff's motion in which they argue
05 that plaintiff has not met the standard for obtaining preliminary injunctive relief. (Dkt. No. 27.)
06 In support of their brief, defendants have submitted declarations by Jim McKeon, a Classification
07 Supervisor for the King County Department of Adult and Juvenile Detention, and David Kersey,
08 M.D., a psychiatrist employed by Jail Health Services. (Dkt. Nos. 28 and 29.) These declarations
09 detail the reasons for plaintiff's assignment to the acute psychiatric housing unit, and the general
10 conditions under which plaintiff is currently confined. (*Id.*) A review of the materials submitted
11 by defendants satisfies this Court that plaintiff has not met the standard for preliminary injunctive
12 relief.

13 ***1. Mental Health Treatment***

14 Plaintiff requests in his motion for preliminary injunctive relief that he be transferred to a
15 facility that can adequately treat his developmental disabilities and mental health needs. Plaintiff
16 asserts that defendants provide absolutely no treatment for his disabilities and that his mental
17 health is deteriorating.

18 The Eighth Amendment imposes a duty upon prison officials to provide humane conditions
19 of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This duty includes ensuring that
20 inmates receive adequate food, clothing, shelter, and medical care. In order to establish an Eighth
21 Amendment violation, a prisoner must show that prison officials knew of and disregarded a
22 substantial risk of serious harm to his health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837
23 (1994). Because plaintiff is a pretrial detainee, his claims arise under the Due Process Clause of
24 the Fourteenth Amendment. *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996). Eighth
25 Amendment standards are, however, still applicable to his claims. *See Id.*

26 Plaintiff makes no showing that defendants have been deliberately indifferent to his health

01 or safety. The record reflects that plaintiff has been incarcerated at KCCF numerous times over
02 the past two and a half years. (*See* Dkt. No. 12 at 6.) His most recent period of incarceration
03 began in July 2004 when he was booked into KCCF on a charge of communicating with a minor
04 for immoral purposes. (Dkt. No. 28 at 1.) Plaintiff was originally sent to the Regional Justice
05 Center ("RJC") in Kent where he was classified as medium security. (*Id.* at 1-2.) However, once
06 at the RJC, plaintiff began making statements indicating that he intended to harm himself. (*Id.* at
07 2.) As a result of these statements, jail health providers were asked to assess plaintiff. (*Id.*) After
08 reviewing plaintiff's history, which included past suicide attempts in jail¹, the jail health providers
09 directed that plaintiff be transferred to the acute psychiatric unit at KCCF where suicide
10 observation could be maintained. (Dkt. No. 29 at 2.) Plaintiff was first assigned to group suicide
11 observation housing, but was subsequently transferred to single cell suicide observation housing,
12 apparently as a result of an order entered by the King County Superior Court restricting plaintiff's
13 phone access to permit him telephone access only to his attorney. (Dkt. No. 28 at 2.)

14 Defendants have produced documents which indicate that, in addition to his history of
15 suicide attempts, plaintiff has a history of ingesting, or threatening to ingest, various objects
16 including razor blades and sharpened toothbrushes. (Dkt. No. 29, Ex. B.) Dr. Kersey states in
17 his declaration that plaintiff has been sent to the hospital several times for treatment related to his
18 claims of self-harm, and that plaintiff just returned from the hospital where toothbrushes he
19 swallowed were removed. (Dkt. No. 29 at 2-3.) Dr. Kersey further states that he has continued
20 plaintiff on 15 minute observation checks because of his behavior, and that his staff visits plaintiff
21 on a weekly basis for psychiatric evaluation follow-up. (*Id.* at 3.) The reports from the weekly
22 visits indicate that plaintiff consistently refuses to respond to staff or denies needing any assistance
23 from staff. (*Id.*, Ex. E.)

25 ¹ The record before this Court indicates that plaintiff has overdosed on Tylenol on at least
26 seven occasions during prior periods of incarceration. (Dkt. No. 29, Ex. A.) A note on one of
the documents produced by defendants indicates that plaintiff has a history of convincing staff to
reclassify him to the general population by reporting that he is not suicidal, and then overdosing
on dangerous amounts of Tylenol. (*Id.*, Ex. A at 1.)

01 Plaintiff is obviously dissatisfied with both his housing assignment and with the mental
02 health treatment he is receiving at KCCF. However, the record indicates that plaintiff was
03 assigned to the psychiatric housing unit in an effort to ensure his own safety. The record further
04 indicates that defendants have been responsive to plaintiff's mental health issues. While plaintiff
05 believes that he should be receiving different types of treatment for his disabilities, differing
06 opinions on medical treatment do not amount to a violation under the Eighth Amendment. *See*
07 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). At this juncture, plaintiff has not established
08 that he is likely to prevail on the merits of his claim of inadequate care for his mental health needs.

09 Moreover, while the record makes clear that plaintiff's mental health issues are serious, the
10 balance of hardships does not tip sharply in plaintiff's favor. Plaintiff is in custody pursuant to
11 felony criminal charges filed against him in King County Superior Court. He is currently awaiting
12 transfer to Western State Hospital for an evaluation of his competency to stand trial on those
13 charges. King County has a substantial interest in bringing plaintiff to trial on his criminal charges,
14 assuming that he is competent to stand trial. The transfer requested by plaintiff would likely
15 deprive the County of the ability to pursue their criminal case against him.

16 Finally, the Court notes that, even if plaintiff were able to establish that the care he is
17 currently receiving is inadequate, the remedy would not be to direct his transfer to another
18 institution. Rather, the remedy would be to direct defendants to provide plaintiff with the care
19 necessary to meet Eighth Amendment standards.

20 Plaintiff has not demonstrated that he is entitled to injunctive relief with respect to his claim
21 of inadequate medical care. Accordingly, plaintiff's motion should be denied with respect to this
22 claim.

23 **2. Telephone Access**

24 Plaintiff requests that he be provided adequate access to a telephone to consult with his
25 attorneys. The Ninth Circuit has recognized that prisoners "have a First Amendment right to
26 telephone access, subject to reasonable security limitations." *Keenan v. Hall*, 83 F.3d 1083, 1092

01 (9th Cir. 1996); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986).

02 The record reflects that inmates in the unit in which plaintiff is housed are confined to their
03 cells for 23 hours per day, and are permitted one hour out of their cells each day to shower,
04 exercise, or make phone calls. (Dkt. No. 28 at 2.) Pursuant to an order issued by the King
05 County Superior Court, plaintiff's access to the telephone is restricted to calls to his attorney.
06 (Dkt. No. 28, Ex. B.) Defendants concede that plaintiff's ability to make calls is, on occasion,
07 further restricted for disciplinary reasons. (Dkt. No. 28 at 2-3.) Defendants indicate that plaintiff
08 has been infraacted eleven times during his most recent period of incarceration, and that these
09 infractions have generally been for defiance and for refusing an officer's orders. (*Id.* at 2.)
10 According to defendants, these infractions sometimes result in plaintiff's one hour out being
11 restricted to every other day or every third day. (*Id.* at 2-3.)

12 While plaintiff's phone access is clearly restricted, it appears that the restrictions are related
13 to legitimate security considerations. The record before this Court suggests that plaintiff is
14 unlikely to succeed on the merits of any claim regarding his telephone access. Moreover, plaintiff
15 has not demonstrated that he will be irreparably harmed if he is not granted the requested relief.
16 Plaintiff has not been deprived of all telephone access, he is merely subject to restrictions arising
17 out of his own behavior.

18 Plaintiff has not demonstrated that he is entitled to preliminary injunctive relief with respect
19 to his claim of inadequate telephone access. Accordingly, plaintiff's motion for preliminary
20 injunctive relief should be denied with respect to this claim.

21 Motion for Class Certification

22 Plaintiff, by way of the instant motion, seeks certification of a class which consists of "all
23 inmates in King County Department of Adult and Juvenile Detention (DAJD) who suffer from a
24 mental illness or developmental disability or are otherwise housed in the psychiatric housing units
25 of King County Correctional Facility (KCCF)." (*See* Dkt. No. 15.)

26 This Court, by Order issued the same date as this Report and Recommendation, denied

01 plaintiff's motion for appointment of counsel on the grounds that plaintiff had not demonstrated
02 that his case involves exceptional circumstances that warrant the appointment of counsel at the
03 present time. As plaintiff has not met the standard for appointment of counsel, plaintiff's motion
04 for class certification must necessarily be denied. The Ninth Circuit has made clear that *apro se*
05 litigant has no authority to appear as an attorney for others. *See C.E. Pope Equity Trust v. United*
06 *States*, 818 F.2d 696, 697 (9th Cir. 1987)(*citing Russell v. United States*, 308 F.2d 78, 79 (9th Cir.
07 1962)). The Court is unaware of any authority which would permit it to relax the standard for
08 appointment of counsel simply because plaintiff wishes to pursue a class action.

09 CONCLUSION

10 For the reasons set forth above, this Court recommends that plaintiff's motions for
11 preliminary injunctive relief and for class certification be denied. A proposed order accompanies
12 this Report and Recommendation.

13 DATED this 30th day of March, 2005.

14 s/ Mary Alice Theiler
15 United States Magistrate Judge
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